

State of California
Regional Water Quality Control Board
San Diego Region

ENFORCEMENT SUMMARY REPORT
November 12, 2008

ITEM: 17

SUBJECT: **PUBLIC HEARING:** Administrative Assessment of Civil Liability, Promenade Mall Development Corporation, Promenade Mall Dewatering Project. The Regional Board will consider adoption of a tentative Order that would impose \$9,000 in civil liability recommended in Complaint R9-2008-0056 for violations of Order No. 2001-96, NPDES No. CAG919002, General Waste Discharge Requirements for Groundwater Extraction and Similar Waste Discharges from Construction, Remediation, and Permanent Groundwater Extraction Projects to Surface Waters Within the San Diego Region Except for San Diego Bay. (Tentative Order No. R9-2008-0104) (Rebecca Stewart)

PURPOSE: The Regional Board will consider whether to adopt an Order to assess \$9,000 in mandatory minimum penalties for violations identified in Amended Complaint No. R9-2008-0056.

PUBLIC NOTICE: On October 13, 2008 a notice was published in the San Diego Union Tribune and on the Regional Board website soliciting public input on payment of the proposed liability. The written public comment period ends on November 5, 2008.

DISCUSSION: On May 20, 2008, the Assistant Executive Officer issued Complaint No. R9-2007-0056 for Administrative Civil Liability with mandatory minimum penalties (MMP) in the amount of \$15,000 against Promenade Mall Development Corporation (Promenade) for violations of effluent limitations contained in Order No. 2001-96. The original Complaint was revised on July 17, 2008 after further review of monitoring data. Nonetheless, the proposed MMP liability amount remained at \$15,000 (Supporting Document 3).

In reviewing MMP violations for general permits it was revealed that the California Water Code (CWC) in effect prior to January 2006 pertained to imposition of MMP for

discharges that were specifically identified in individual NPDES permits. Because General NPDES permits typically do not identify specific discharge locations, discharges like Promenade, enrolled in a general NPDES permits, were exempt from MMP. Discretionary liability, however, could still be assessed. Therefore, two of the five violations alleged in the Complaint were no longer considered MMP violations. As a result, the Regional Board's prosecution team notified the discharger, by letter dated October 2, 2008, that the penalty would be reduced to a liability of \$9,000 for three violations that occurred in January and December 2006 (Supporting Document 4). Each of the three violations are defined as serious violations¹, which are subject to the assessment of \$3,000 in MMP in accordance with CWC section 13385(h). Discretionary civil liability above the mandatory minimum for the violations alleged in this Complaint is not recommended.

Promenade has presented an argument against the assessment of MMP for the two violations reported on December 13, 2006 (Supporting Document Nos. 5 and 6). The discharger contends MMP should not be assessed on days that violations of effluent limitations were reported if the Regional Board cannot document that its discharge that enters a City of San Diego storm drain was not diverted to the Point Loma Wastewater Treatment Plant by a City installed low flow interceptor. The City could not provide the Regional Board information as to whether or not the discharge entered Mission Bay on December 13, 2006 but it has confirmed that the discharge was diverted to Mission Bay on January 1, 2006, therefore this argument does not apply to the January 2006 nickel violation (Supporting Document No. 7). The Regional Board's prosecution team has prepared a memorandum to the Assistant Executive Officer which provides detailed information regarding Promenade's discharge and regulatory history, as well as an evaluation of Promenade's argument (Supporting Document No. 8). Essentially, Promenade's defense fails to meet any of the exemptions to MMP established in CWC section 13385(j). Therefore, the assessment of the mandatory minimum penalty of \$9,000 is appropriate in this instance.

¹ A serious violation means any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to Section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I pollutant by 40 percent or more.

LEGAL CONCERNS: None.

SUPPORTING
DOCUMENTS:

1. Location Map
2. Tentative Order No. R9-2008-0104
3. Amended Administrative Civil Liability Complaint No. R9-2008-0104
4. Regional Board letter dated October 2, 2008 further amending Complaint No. R9-2008-0056
5. Promenade letter dated June 6, 2008
6. Promenade letter dated June 20, 2008
7. Email from City of San Diego regarding pump station interceptor operation dated August 4, 2008
8. Regional Board Prosecution Team memo to Assistant Executive Officer regarding Promenade argument dated October 27, 2008

RECOMMENDATION: The adoption of tentative Order No. R9-2008-0104 is recommended.